

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 645.

JOSEPH LEE JONES and BARBARA JO JONES,  
Petitioners,

vs.

ALFRED H. MAYER COMPANY, a corporation, ALFRED  
REALTY COMPANY, a corporation, PADDOCK COUN-  
TRY CLUB, INC., a corporation, ALFRED H. MAYER, an  
individual, and an officer of the above corporations,  
Respondents.

ON WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.  
Brief of Amicus Missouri Commission on Human Rights.

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**STATEMENT.**

The Missouri Commission on Human Rights, amicus curiae, adopts the statement of jurisdiction and statement of the case presented by petitioners.

The Missouri Commission on Human Rights was established in 1959 as the official arm of the State to encourage fair treatment for all groups. Chapter 213, RSMo 1959. The Commission is charged with the responsibility of enforcing the Fair Employment Practices Act, Chapter 296, RSMo Supp. 1965, and the Public Accommodations Act, Chapter 314, RSMo Supp. 1965. Missouri does not have statewide legislation prohibiting discriminatory practices in housing. A Fair Housing bill was introduced in the last regular session of the legislature but was not passed into law by the

General Assembly. (House Bill No. 501, 74th General Assembly of the State of Missouri)

This brief is submitted by the Commission on Human Rights of the State of Missouri sponsored by the Attorney General of the State of Missouri under Subsection 4 of Rule 42, Rules of the Supreme Court of the United States.

We shall in this brief endeavor to avoid repetition of arguments presented by others. However, this should not be interpreted as lack of support by the Commission for other arguments submitted in behalf of the petitioners. The Commission supports the position of the petitioners in this cause.

## **SUMMARY OF ARGUMENT.**

### **I.**

Discrimination affecting public rights and privileges as schools, elections, etc. clearly violates the Fourteenth Amendment. The direct consequence and proximate affect of respondents' discriminatory refusal to sell deprives the petitioners of these rights.

Many civil rights run with the land. They can be exercised in actuality only where one lives. Frequently, rights are attached to the land perforce of state or local laws. For example, in order to attend free the local public school one must be a resident of the school district.

Respondents and other suburban developers—for personal or profit motives—desire to exclude Negroes from the communities which they develop. Their concern is not primarily with Negroes owning houses but with Negro presence and involvement in the community in its many facets: schools, parks, recreation, libraries, health services, etc. Respondents are able to achieve their ends with the assistance of legal residence requirements. For example if no residence requirement applied to free public education, land developers would

be unable to exclude minority groups from the schools within the community which they are developing.

Because respondents' discriminatory purposes can only be achieved with the assistance and by the joinder of state action their conduct comes within the scope of the Fourteenth Amendment and they cannot act so as to deprive persons of fundamental human rights solely on the grounds of their race.

## II.

The state, through St. Louis County, is significantly involved in respondents' development of suburban communities by its detailed and comprehensive zoning ordinances and subdivision regulations.

The respondents plan, construct, and provide for the perpetuation of a community of 2700 families. The respondents, and the board of trustees they create, plan, construct, and maintain shopping areas, streets, street lights, sewer and water systems, parks and recreational facilities; these functions are essentially governmental.

Therefore, respondents' discriminatory refusal to sell to petitioners falls within the prohibitions of the Fourteenth Amendment.

**ARGUMENT.****I.**

Petitioner's first amended complaint states a claim upon which relief may be granted because respondents' refusal to consider petitioner's offer to purchase respondents' house solely on the grounds of race deprived petitioners of rights guaranteed under 42 USC Section 1982 and the Fourteenth Amendment in that respondents' discriminatory refusal assisted by and joined with the state's residence requirements unlawfully deprived petitioners of public rights and privileges which are inherent in the establishment of residence.

Discrimination affecting public rights and privileges as schools, elections, etc. clearly violates the Fourteenth Amendment. The direct consequence and proximate affect of respondents' discriminatory refusal to sell deprives the petitioners of these rights.

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be achieved with the assistance and by the joinder of state action their conduct comes within the scope of the Fourteenth Amendment and they cannot act so as to deprive persons of fundamental human rights solely on the grounds of their race.

In its testing for the "actuality of state involvement" the district court erroneously separated the purchase of a house from the milieu of rights and privileges which necessarily inhere in the establishment of residence. These community rights and privileges are inseverable from residence. They run with the land.

Petitioners alleged that respondents' subdivision development here would result in a suburban community of approximately 2700 families providing all the needs of a residential community such as streets, recreational facilities including a golf course, bath and tennis club, sanitation collection, etc., and that community facilities and services will be provided under the direction of the board of trustees which will have the power to levy assessments, to establish lends on property and to make contracts for the performance of services for the benefit of Paddock Woods residents equivalent to functions performed by a municipal government. Allegation No. 8, Plaintiffs First Amended Complaint; 255 F.Supp. 115, 128.

The court recognized that these public services would have to be provided on a nondiscriminatory basis. "It may well be that once streets are built, parks set aside and garbage collection provided for by defendants, the residents of this subdivision will be entitled to utilize these services on a nondiscriminatory basis. But this is not the question before us." 255 F.Supp. 115, 129.

The court also recognized that the availability of educa-

tional and various state and county facilities must be available to all citizens without discrimination. *Supra*, l.c. 128.

The district court noted that there was no contention that petitioners were barred from using the streets which respondents would build and maintain within the subdivision. The court however failed to note that respondents' action would effectively bar the petitioners from using the educational, recreational, health and other public services which run with the land.

The district court found "The state has not intervened to assist defendants." *Supra*, l.c. 129. But the district court failed to discover that the state's action in conditioning public rights and privileges upon residence established a tool which the respondents made use of to discriminatorily deprive petitioners of free choice of the community in which they would live.

The district court stated, *supra*, l.c. 129:

"When all is said and done, the complaint clearly demonstrates that defendants did no more than politely refuse to enter into a contract of sale with plaintiffs."

The district court limited its attention to the transfer of a piece of realty as though it were a mobile commodity severable from the community within which it is located. The district court narrowly focused on a singular event without looking beyond to its normal and necessary consequences. The transfer of realty is merely the gate through which one goes to enter the community. The consequences of the transfer are the entering into the community and the receipt of all the rights, privileges and responsibilities which attach to the community. **The real rights at issue here are those which follow as the consequence of the transfer of real estate.** The substance of this case lies on the other side of the gate. With the assistance of state action, respondents have

discriminatorily deprived the petitioners of those substantive rights.

All have the unquestionable constitutional right to public education without discrimination as to race, creed or national origin. Yet this right remains inchoate so long as it is unaccompanied by freedom of residence. It runs with the land.

Most public school systems in this nation in urban areas divide the district into attendance zones based upon a neighborhood plan. This is the traditional method of allocating schools particularly at the elementary level. As a result, housing patterns have frequently frustrated the efforts at national and local levels to eliminate segregation in education.

Where neighborhood attendance zones are fairly drawn the courts have upheld the neighborhood system and considered segregation resulting from housing patterns to be a matter outside the control of boards of education.

In **Mapp v. Board of Education of the City of Chattanooga**, 6 Cir., 373 F.2d 75, the plaintiffs objected to the use of attendance zones by the school board. The court stated, l.c. 78:

"If this policy has resulted in a larger attendance of white or Negro children in a particular school it is because of their residences, a factor which the Board of Education cannot control. No child, Negro or white, has been denied the right to attend school in the zone of his residence." (Emphasis ours)

In **Deal v. Cincinnati Board of Education**, 6 Cir., 369 F.2d 55, the court also considered a neighborhood attendance zone plan, l.c. 60:

"In the present case, the only limit on individual choice in education imposed by state action is the use of the

neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and **they can move into the neighborhood district of such a school.** This situation is far removed from **Brown**, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school prejudice. We read **Brown** as prohibiting only enforced segregation." (Emphasis ours)

The court's advice, "they can move into the neighborhood district of such a school," is meaningful to a white citizen but not to the Negro so long as respondents and other community developers discriminate in the sale of housing.

In the City of St. Louis school district residential segregation has perpetuated de facto segregated schools despite the fact the administration has voluntarily complied with the **Brown** decision. U. S. Commission on Civil Rights, **Racial Isolation in the Public Schools** (1967), pages 33 and 60.

By law this State provides public education through local school districts which are separate public corporations with definite geographic boundaries. Chapter 162, RSMo Supp. 1965. The law further authorizes the subdividing of school districts into attendance zones. Section 177.091, RSMo Supp. 1965.

In order to receive a free public education within a school

district the law requires that the pupil be a resident of the district. Nonresidents are admitted only on a tuition basis. Within a school district the school board may by reasonable regulation require a people to attend the school within the attended zone within the district. Thus, by virtue of the state and local governmental requirements residence becomes the key to exercising the right to freedom of choice in education.

The problem is further complicated by the fact that discriminatory housing patterns also affect the primary political method of effecting social reform, namely, elections. Missouri statutes provide for the reorganization or annexation of school districts. Chapter 162, RSMo Supp. 1965. But the key to these procedures is the vote. Before a reorganization can occur the proposition must be approved by a majority of the voters in the district to be annexed and also approval of the board of directors of the district making the annexation. Section 162.441, RSMo Supp. 1965. Therefore, so long as some school districts (e.g. Kinloch, discussed *infra*) remain predominately of the minority race and the adjoining school districts remain predominately of majority race, then Negroes will remain educationally isolated and in de facto apartheid communities.

State and local residence requirements attach numerous other public rights and privileges to the land. One must be a resident to enter the community hospital, receive welfare payments, and even to check a book out of the local public library. A comprehensive list of public services which depend upon residence would cover most aspects of local community life.

"Access of the Negro to decent housing is becoming the vortex around which his other rights revolve. Without housing in areas of his choice, the right of his child to an unsegregated school is meaningless; his right to a

job will be impaired; his right to move and to secure shelter in a decent neighborhood will be an empty shell." Abrams, **The Housing Problem**, in *Daedalus* 64, 72 (Winter 1966)

"... lack of housing opportunities lies at the heart of the Negro's other social problems. The discriminatory practices which confine him to the central city work at the same time to bind him to poor schools and to a generally unhealthy environment." Lord, **Equal Opportunity in Housing**, 9 (1966)

We turn now to consider how respondents and other suburban developers make use of the state and local requirements tying rights and privileges to residence in order to discriminatorily deprive petitioners and others of exercising those rights and privileges.

Despite modern communication and transportation people especially in suburban areas, conduct much of their day-to-day life within a circumscribed area. This is recognized by the suburban developer and his product is not a house but a community. He sells not a "cabin in the pines" but a comprehensive local society. He offers a "planned community" with churches, schools, parks, recreation centers and convenient access to main roads and transportation. Every such development includes a "shopping mall," today's equivalent of a town square.

The key promotional word is "exclusive" succinctly expressing "you can keep your child out of an integrated school by moving to the suburbs." For profit or personal reasons he is motivated to exclude minority groups. His purpose is not to deprive the discriminated class from purchasing a house, but to exclude them from the community and the community life. By excluding a Negro from obtaining a residence within the community he effectively excludes him

from the local public schools, local governmental offices, local parks and recreational facilities, etc. This is the aim to keep the minority group off the local municipal and school bus, out of the local little league baseball and soap box derby and away from the convenient shopping mall within "smart shops" and "attractively landscaped court".

It is living and not owning. It is presence and not possession. It is entering into the community with its composite personal interrelations that is objected to by the discriminator. The old phrase, "from the other side of the tracks" is illustrative of the concept. A house on the other side of the tracks may only be 100 yards away, nevertheless, it is cut off and not part of the community. However, a house on the "right side of the tracks" even though further away is part of the community.

If the petitioners here had expressed the intent to merely acquire the ownership of a house in respondents' subdivision with the purpose that a member of Mrs. Jones' family who are white would live in the house, one can speculate that the respondents would have made the sale. If a white family had sought to purchase a house from the respondents and if they had obtained financing from the Negro bank, again this would not have been likely to prevent the sale. These hypotheses are proposed to demonstrate that the end sought by the developer of a suburban community is not exclusion of Negro interest in real estate but rather the exclusion of Negro presence within the community. A person may own houses in several different communities but he is a resident only in the community in which he lives.

The membership card to a local community is a residence. Without this admission card one can partake neither in the responsibilities nor the benefits of the community. By virtue of the State's residence requirements suburban developers control that membership card.

In **United States v. Guest**, 383 U.S. 745, 16 L.Ed.2d 239, 86 S.Ct. 1170, this court stated the standard of state involvement as follows:

"... [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Supra*, (U.S.) l.c. 755 and 756.

The action of government here is parallel to the action of government in the **Steele v. Louisville and Nashville Railroad Company**, 323 U.S. 192, 89 L.Ed. 173, 65 S.Ct. 226.

Justice Murphy, in his concurring opinion expressed it thus, (U.S.) l.c. 208:

"Congress, through the Railway Labor Act, has conferred upon the union selected by majority of the craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representatives shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution."

Also: **Brotherhood of Railway Trainmen v. Howard**, 343 U.S. 768, 96 L.Ed. 1283, 72 S.Ct. 1022, a suburban developer may be "essentially a private organization" but state and local laws have conferred on him power to bind all mem-

bers of a community. He therefore cannot act "so as to ignore rights guaranteed by the Constitution."

In the case of **Hawkins v. North Carolina Dental Society**, 4 Cir., 355 F.2d 718, the court considered the issue of whether the discriminatory membership practices of the North Carolina Dental Society and its regional associates constituted denial of equal protection of the laws.

At the time the suit was initiated state statutes required that six members of the State Board of Dental Examiners be elected by the Society. The Society also participated by virtue of statute in the State Medical Care Commission and the Mental Health Council. During the pendency of the suit these statutes were modified and eventually repealed.

The court stated, *supra*, l.c. 721, 722:

"... it clearly appears that effective control of the practice of dentistry in North Carolina is in the Society. With respect to dentistry, the legislature leans heavily upon the Society. Its recommendations as to legislation are accepted, and embarrassing legislative recognition of its authority readily eliminated at its request. At the same time, while the statutes have undergone normal change at the Society's behest, there is no evidence of any change in its practical power to control the selection of the dental members of North Carolina's Boards, Commissions and Councils, \* \* \* An organization vested by statute with the power to control, or even to substantially, influence, the selection of state officers functions as an arm of the state."

The court stated that the Dental Society "appears to be functioning clearly as the agent of the state in the selection of dental members of the state's boards and commissions." *Supra*, l.c. 722. The court, however, did not premise its holding upon this finding. It further stated, *supra*, l.c. 722:

"It is enough that North Carolina in some of its manifestations has involved itself in Society's activities, and its Society's exercise of its powers of practical control or significant influence in the selection of state officials is a public function performed under the general aegis of the state."

The court held the society's activities to have the "character of state action and that its racially exclusive membership practices contravene the Fourteenth Amendment."

It is legal and reasonable for the state to provide that members of a professional examining board will be selected by the members of the professional society. The members of the North Carolina Dental Society, however, joined to the reasonable state requirement discriminatory membership practices which were in themselves private. Were it not for the combining of the two elements the practice of the Society would likely be outside the reach of the Fourteenth Amendment. The members of the Dental Society, however, used the reasonable state requirement as a means of denying Negroes a voice in the selection of state officials affecting the dental profession.

A community or neighborhood is a society. The right to receive benefits and to participate in the government of that society, which is public and not private, depends upon one's having membership in the society. The membership card in this context is residence.

Respondents exercise practical control over the ability of petitioners to exercise numerous constitutionally guaranteed rights and also significantly influence the selection of public officials and political actions. Without the residence controls imposed by the state respondents could not exercise such powers.

The control exercised by respondents and other suburban

developers effects large areas and many persons. It achieves de facto almost everything that express segregation laws would.

A parallel exists between the Union of South Africa and communities within the United States where freedom of residence does not exist. The Union of South Africa by positive law requires segregation. In that nation there exists apartheid de jure. In many American communities there exists apartheid de facto. Although the first exists as a result of an active official policy and the second exists as a result of a passive official policy, the practical effect of both systems is the same.

"The official and most widely accepted mean [of apartheid] refers to the 'separate development' of the 'races', each according to its own genus or inherent characteristics, in geographically delineated areas." **South African Apartheid Legislation**, 71 Yale L.J. 1, 2.

The main purpose of the South African statutes is to provide for the physical separation of the races. *Supra*, l.c. 16 et seq. In South Africa the Group Areas Act establishes separate areas in which each race must dwell and do business. The purpose of the act is to prohibit residential intermixing. *Supra*, l.c. 18, 21.

The South African statutes not only provide for the separation of white from non-white, but also provides special systems for governing Africans in the areas to which they are relegated. *Supra*, l.c. 29. Apartheid de facto can produce the same effect. Where residential patterns produce a physical separation of the races the result can lead to municipal governments where the citizenry is of one race and such political units exist side by side with other political units where the citizenry is almost entirely of the opposite race. Political boundaries have been drawn manifesting generations of discriminatory housing patterns.

Within St. Louis County wherein respondents do business there are numerous cities and towns. One of these is the city of Kinloch. The population of Kinloch is 100 percent non-white. Kinloch is completely surrounded by two other municipalities, Berkeley and Ferguson. The percentage of non-white population of Berkeley is 0.6 percent. The percentage of non-whites in Ferguson is 0.1 percent. Of the 703,532 people in the county only 2.8 percent are non-white. U. S. Bureau of the Census, United States Census of Population: 1960; **General Population Characteristics, Missouri**, Final Report, PC (1)—27B, Table 13.

De facto apartheid is also manifest in the public school districts within St. Louis County. School districts in Missouri are separate political subdivisions from cities and counties. School districts within St. Louis County may be formed without regard to the boundaries of other political subdivisions. Chapter 162, RSMo Supp. 1965. The community of Kinloch is also educationally isolated. The Kinloch school district which enrolls 1384 pupils is 100 percent Negro. The Ferguson-Florissant school district to the east and north of Kinloch enrolls 17,210 pupils; only 225 are Negro. The Normandy school district to the south and east enrolls 7,995 pupils; only 251 are Negro. The Hazelwood district to the north enrolls 15,608 pupils; only 28 are Negro. The Jennings district to the east has 100 percent white enrollment. United States Department of Health, Education and Welfare Office, Inventory of Public School Systems, Fall 1966.

Whether the community is apartheid de jure or apartheid de facto, either results in separation in schools, hospitals, libraries and other public facilities. Such separation universally results in inferior services for the minority group. Separate will never be equal. **Brown v. Board of Education**, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686. **Open Housing Meets My Old Kentucky Home: A Study of Open Housing With**

**Special Attention to Implications for Kentucky, 57 Ky. L.J. 140, 163 et seq.**

The quality of education offered in Negro schools is inferior to the quality of education offered in white schools. This is true from the standpoint of the poor physical facilities, inferior educational programs, and less qualified teachers. The identity with such an educational system causes problems of self-esteem on the part of the Negro. Problems created by the inferior education and the lack of self-esteem result in Negro students who are educated in predominately Negro institutions performing poorly academically. Such poor academic performance is a cause of Negroes earning less, and being employed in less responsible positions than comparably educated whites. The U.S. Civil Rights Commission expressed it as follows, U.S. Civil Rights Commission, **Racial Isolation in the Public Schools** (1967).

"There are some noticeable differences in the quality of school facilities available to Negro and white students in the Nation's metropolitan areas. **The Equality of Educational Opportunity** survey reported that although Negro and white children were equally likely to attend schools with libraries, whites more often attended schools with more library volumes per student. White students also were more likely to attend schools which had science laboratories." l.c. 92.

• • •

"The survey reported that whites more often were in schools which had advanced courses in particular subjects, such as science and language, they also were more likely to be in schools with fewer pupils per teacher. In most cities studied by the Commission it was found that schools with nearly all-Negro enrollments were overcrowded more often than nearly all-white schools. This

often resulted in the establishment of classes in temporary structures—sometimes in the basement of churches or other public buildings.” l.c. 92 and 93.

• • •

“Negro students, . . . were exposed less often than white students to teachers whose college major was in an academic subject—mathematics, science, or literature.” Negro students also were more likely than whites to have teachers with a low verbal achievement level, to have substitute teachers, and to have teachers who are dissatisfied with their school assignment.” l.c. 92, 93. Also see: U.S. Office of Education, **Equality of Educational Opportunities**, James S. Coleman et al. (1967), pp. 70, 73, 78, 100, 140, Tables 2.21.4, 2.21.8, 2.21.13, 2.24.2, 2.33.8 respectively.

“Young Negro children often tend to reject their own skin color, and to have problems of self-esteem \* \* \* the racial composition of schools can serve either to overcome or to compound these problems of low self-esteem.” l.c. 103.

• • •

“In part, the relationship between racially isolated schools and poor performance and low self-esteem is based upon the fact that predominantly Negro schools are generally regarded as inferior by the community.” l.c. 104.

• • •

“At the Commission hearing in Rochester, Franklyn Barry, Superintendent of Schools in Syracuse, N.Y., testified that in such schools, teachers often ‘average down’ their expectation of the students.” l.c. 105.

• • •

“The environment of schools with a substantial ma-

jority of Negro students, then, offers serious obstacles to learning. The schools are stigmatized as inferior in the community. The students often doubt their own work, and the teachers frequently corroborate these doubts. The academic performance of their classmates is usually characterized by continuing difficulty. The children often have doubts about their chances of succeeding in a predominantly white society and they typically are in school with other students who have similar doubts. They are in schools which, by virtue both of their racial and social class composition, are isolated from models of success in school." l.c. 106.

\* \* \*

"The time spent in a setting of racial isolation or desegregation has an impact on student attitudes and achievement. The longer Negro students are in racially isolated schools, the greater the negative impact is likely to be. The cumulative effect of isolation also extends to income and occupation." l.c. 106.

\* \* \*

"The cumulative effect of desegregation was reflected in data from the **Equality of Educational Opportunity** survey. \* \* \* It shows a consistent trend toward higher academic performance for Negro students the longer they are in school with whites. \* \* \* Disadvantaged Negro children generally perform at higher levels if they have been in school with whites for some time, regardless of the present social class level of their classmates. They perform at even higher levels if, instead of simply being in schools with whites whose family background is the same as theirs, they are in school where the students are from families of a higher educational background." l.c. 106.

\* \* \*

"The cumulative effect on attitudes is similar. Negro students who had contact with whites since the early elementary grades are more likely to feel able to affect their own destiny than those who have not had that experience." l.c. 103-108; Also see: l.c., appendices, p. 62 Table 3.5.

. . .

"The cumulative effects of education extend in later life to differences in income and occupation. Negroes with levels of education similar to whites do not earn similar amounts of money or hold similar jobs. These differences have been attributed both to employment discrimination and the quality of education." l.c. 108.

. . .

"Negro adults who experienced desegregated schooling tend to have higher incomes and more often hold white-collar jobs than Negro adults who attended isolated schools. These differences are traceable to the higher achievement levels of Negroes from desegregated schools, and, in part, to the fact that association with whites often aids Negroes in competing more effectively in the job market." l.c. 114.

Housing discrimination severely impairs the geographic mobility of an individual which is often a prerequisite to occupational mobility.

It requires no documentation that a major manifestation of mobility in the United States has been the movement of business and industry from large cities into suburban areas, as well as the movement of population from major cities to the suburbs. St. Louis County, the origin of the litigation in question, had a population of 703,532 in 1960. Of this number only 298,671 resided in 1960 in the same house that they occupied in 1955. Fully 178,927 of the per-

sons living in St. Louis County in 1960 had lived in a different county in 1955. U. S. Bureau of the Census, **Census of Population 1960, Missouri General Social and Economic Characteristics**. Table 82, page 27-269.

The expansion of employment opportunities in the county is illustrated by a comparison of salient data for 1950 and 1960. In 1950 the total **male civilian labor force** residing in St. Louis County was 118,082 of whom 115,595 were employed. U. S. Bureau of the Census: **1950 Census of Population, Volume 2, Characteristics of the Population, Part 25, Missouri**. Page 25-133, Table 43. In 1960, the total male civilian labor force residing in St. Louis County had grown to 189,325 and the number of employed males had risen to 185,255.

Not all of the employed persons residing in St. Louis County were necessarily employed in the county, but it is fairly evident that the growth in population within the county was correlated to the growth of industry and commerce within the county. It is, therefore, instructive to note that although all of the foregoing figures represent statistical increases from 1950 to 1960 the non-white population of the county was relatively static during the decade. In 1950, the non-white population was 17,026. U. S. Bureau of the Census, **Census of Population 1950, Missouri General Characteristics**, Table 42, at page 25-118. In 1960, the non-white population was 19,881. U. S. Bureau of the Census, **Census of Population 1960, Missouri General Social and Economic Characteristics**. Table 82, at page 27-269.

The minimal increase in the non-white population is not caused by a lack of Negroes within the St. Louis area, as evidenced by the 1960 non-white population of the adjacent City of St. Louis: 215, 824. U. S. Bureau of Census, *supra*, pages 27-312. ✓

There is objective information to demonstrate that the hindrance to the movement of Negroes into St. Louis County also serves as a hindrance to employment. Thus, the Human Development Corporation of metropolitan St. Louis has reported that its data, relative to efforts at placing Negroes in jobs (through the mechanism of Work Opportunities Unlimited, a private non-profit community action agency) "... indicated that during the period from March, 1967 through August, 1967, about 111 job vouchers ... remained unfilled ... lack of transportation was a sole or contributing factor in 34 of these cases, representing approximately 450 jobs." The bulk of the jobs were located in St. Louis County, and the persons who were unable to accept them were residents of St. Louis City. The problem is so acute that the U.S. Department of Housing and Urban Development is financing a system of mass transportation, to supplement existing public transportation services. **Mass Transportation Demonstration Project.** Bi-weekly Status Report No. 1, Human Development Corporation of Metropolitan St. Louis, October 30, 1967.

The lawful residence requirements of state and local governments are in themselves generally necessary and reasonable. It is not the requirements but the exploitation of the requirements by those who control the sale of land which is objectionable. This joint action of private upon state action is the means by which discriminatory land dealers are able to maintain de facto apartheid communities. The action of the state is a necessary ingredient to the venture. Without the state involvement the discriminatory community developer would be unable to deprive minority citizens of full exercise of their community civil rights.

When the state's residence requirements are combined with the deprivation of the right to choose one's place of residence, the product is de facto segregation. The state be-

comes, albeit unintentionally, the collaborator in discriminatory property conveyances so as to effectively deny the equal exercise of the civil rights. If it were not for the state's action in tying free public education and other rights to residence, the discriminatory seller could not successfully deprive persons of them.

Local government provides numerous services: fire and police protection, sanitary disposal, water, lighting, health and medical services, transportation and roads, parks, museums, theatres, auditoriums, community centers, and market places etc. No one questions the right of all persons to use such public services without discrimination. But what has been overlooked especially by the district court here is that residence is the key to use of every one of these services. Without the right to acquire residence within the community of one's choice a person is as effectively deprived of the use of these services, as one would be if government directly discriminated in the extending of services. To have the right to ride on a public bus is meaningless until one has the right to purchase a seat.

The right to acquire the residence of one's choice is as basic and as comprehensive as citizenship itself. For at the state and local level residence is synonymous with citizenship.

There is perhaps no more valuable single right than the right to select location of one's home. The family is the basic unit of every society and the home is the physical manifestation of this unit. When one obtains a home in a community, he does not merely purchase shelter from the elements but acquires a package of rights, privileges and responsibilities which are concisely expressed in the term "residence".

Therefore, respondents' refusal to consider petitioners'

offer to purchase solely on the grounds of race deprives petitioners of equal protection of these rights:

## II.

Petitioners' first amended complaint states a claim upon which relief may be granted because respondents' refusal to consider petitioners' offer to purchase respondents' house solely on the grounds of race, deprived petitioners of rights guaranteed under 42 U.S.C., Section 1982 and the Fourteenth Amendment; there is significant state involvement in the respondents' activities, the respondents activities have a substantial impact on public interest, and the respondents act as a government instrumentality performing governmental functions.

Governmental involvement in discrimination by suburban developers has reached a level at which the restrictions of the Fourteenth Amendment apply. The activity of subdividing land and developing it into communities is one in which the state has become a joint and active participant.

Here, the state has participated in developing suburban communities by the action of the St. Louis County Council and the St. Louis County Planning Commission. These two bodies have regulated almost every aspect of a subdivision by the Zoning Ordinances of St. Louis County and the Subdivision Regulations of St. Louis County.

The population in St. Louis County has reached such a density, the county has enacted ordinances to promote effective use of the land. The Zoning Ordinances of St. Louis County, Missouri, Sections 1003.010-1003.420 regulate residential, industrial, recreational, and public areas of the county. The Zoning Ordinances also includes detailed instructions on subdivision direction signs and subdivision information signs. Section 1003.167, The Zoning Ordinance of St. Louis County, Missouri, amended 1966.

The St. Louis County Planning Commission has adopted extensive regulations governing the subdivisions of land in the unincorporated portions of St. Louis County. These regulations cover the respondents' developments in question here.

The stated purpose of these regulations is:

"... to promote the health, safety, convenience and general welfare of the inhabitants of St. Louis County, and to guard against the creation of slums, blighted areas of deficit districts by assisting in bringing about the co-ordinated, efficient and economical development of the unincorporated portions of the county the following regulations and minimum standards have been adopted by the St. Louis County Planning Commission". **Subdivision Regulations, St. Louis County Planning Commission, Section 1005.020.**

Section 1005.020 further suggests that each subdivider of land confer with the Commission before preparing the preliminary plan in order to become familiar with the proposals of the official master plan affecting the territory in which the proposed subdivision lies.

Every subdivision of land within the unincorporated area of St. Louis County must be submitted to the Commission upon a plat for their approval or disapproval. If the Planning Commission approves it, it is then submitted to the County Council for its approval or disapproval. The plat cannot be recorded or lots sold until it is so approved. **Subdivision Regulations, St. Louis County Planning Commission, Section 1005.040.**

The Subdivision Regulations cover relation to adjoining street system, (Section 1005.080); streets in relation to railroads, superhighways and parkways, (Section 1005.090); street and alley width, (Section 1005.100); blocks, (Section

1005.110); lots, (Section 1005.120); exceptions in neighborhood unit developments, (Section 1005.130); building lines, (Section 1005.140); character of development, (Section 1005.150); parks, school sites, etc., (Section 1005.160); easements along streams, (Section 1005.170); improvements, (Section 1005.180); inspection and permits, (Section 1005.190); and variations and exceptions, (Section 1005.200).

Section 1005.190, Subdivision Regulations of St. Louis County, provides that the County Planning Commission staff shall make periodic inspections of the subdivision areas during the planning stages and as construction progresses. The County Highway Division shall inspect all streets and improvements within the street right-of-way and all storm sewers outside the Metropolitan St. Louis Sewer District during the progress of construction. The County Highway Division shall inspect private streets as a representative of the Planning Commission and report defects and substandard work. This section further provides that no construction can commence until a subdivision construction permit is obtained from the Planning Commission. The Planning Commission is to collect fees for subdivision permit fees and construction fees, and inspection fees.

Two sections which illustrate the county's awareness that a subdivision can be a community, much like a municipal corporation are the following:

**"1005.150 Character of Development.**—The Commission shall confer with the subdivider regarding the type and character of development that will be permitted in the subdivision, and may agree with the subdivider as to certain minimum restrictions to be placed upon the property to prevent the construction of sub-standard buildings, control and the type of structures, or the use of the lots which, unless so controlled, would clearly depreciate the character and value of the proposed sub-

division and of adjoining property. Deed restrictions or covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future, provided, however, that such deed restrictions or covenants shall not contain reversionary clauses wherein any lot shall return to the subdivider because of a violation thereon of the terms of the restrictions or covenants. Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily maintained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities, for the proper and continuous maintenance and supervision of such facilities." **Subdivision Regulations, St. Louis County Planning Commission, Section 1005.150.**

"**1005.160 Parks, school sites, etc.**—In subdividing property, consideration shall be given to suitable sites for schools, parks, playgrounds and other common areas for public use so as to conform to the recommendations of the Commission in its adopted master plan or portion thereof of the County. Any provision for schools, parks and playgrounds should be indicated on the preliminary plan in order that it may be determined when and in what manner such areas will be dedicated to or acquired by the appropriate taxing agency." **Subdivision Regulations, St. Louis County Planning Commission, Section 1005.160.**

As the complaint states, the impact of the Alfred H.

Mayer Corporations' policy of not selling a house or lot to a Negro is the same in effect as if a municipal corporation would agree to exclude Negroes, and the cumulative effect of the Alfred H. Mayer Corporations' policy and that of other corporations developing housing projects in St. Louis County is the same as if the county had passed an ordinance forbidding the sale of a new house to a Negro. In St. Louis County only 2.8 percent of the residents are non-white. U. S. Bureau of Census, **U. S. Census of Population: 1960. General Population Characteristics, Missouri.** Final Report PC(1)—27B.

Considering respondents complex of subdivisions, the company's policy of not selling a house to a Negro will affect 2700 families who will ultimately occupy these houses. More people will live in these subdivisions than live in some Missouri Counties. Carter County has a population of 3,973 and Worth County has a population of 3,936. U. S. Bureau of Census, **U. S. Census, Population: 1960. General Population Characteristics, Missouri.** Final Report PC(1)—27 B. Table 13. There are hundreds of incorporated cities and towns in Missouri whose ordinances do not affect as many people. The issue before this court is not the narrow issue of the right of an individual property owner to exclude another individual from acquiring a particular house. Discrimination by a suburban developer unlike discrimination by an individual has the effect of excluding Negroes from an entire community.

A suburban developer creates a subdivision as a business venture. This subdivision will develop into a community possessing many of the attributes of a municipal corporation. The community and its developer, by virtue of these functions, becomes a governmental instrumentality which performs governmental functions.

The developer performs the same functions that are per-

formed by a municipal planning commission. In addition he puts into reality that which he plans, and he further provides for the perpetual maintenance of the community created. The Articles of Incorporation of Paddock Hills corporation on record with the Missouri Secretary of State provides in Section 8 thereof as follows:

**"EIGHTH:** The purposes for which the corporation is formed are as follows: To acquire by purchase, lease or otherwise, and to improve and develop real property; to erect dwellings, apartment houses, and other buildings, private or public of all kinds, and to sell or rent the same; to lay out, grade, pave and dedicate subdivisions, lots, areas, tracts, roads, streets, avenues, highways, alleys, courts, paths, walks, parks and playgrounds; to buy, sell, mortgage, exchange, lease, let, hold for investment or otherwise, use and operate, real estate of all kinds, improved or unimproved and any right and interest therein; and to do all things which may be necessary for or in the best interests of the business of this corporation."

The developer plots the community establishing the location of streets, restrictions on construction, reserving areas for churches, schools, and mercantile centers, laying out parks and recreational areas, etc. The more affluent the community the more numerous and varied are the public facilities. One may find lakes, swimming pools, tennis courts, golf courses, community centers, etc.

Having planned and constructed such a community the suburban developer provides for its perpetual maintenance by establishment of a board of trustees which has numerous powers expressed in a trust agreement which binds all the property in the community.

The St. Louis County Subdivision Regulations expressly

provide for the "proper protection and maintenance of the development in the future."

"Deed restrictions on covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future . . . Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily maintained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities for the proper and continuous maintenance and supervision of such facilities." **Subdivision Regulations, St. Louis County Planning Commission, Section 1005.150.**

By virtue of such regulations and trust agreement provisions, a suburban board of trustees is given the power to assess and collect money from the residents of the community in order to maintain the common facilities and services within the community. This may include not only the maintenance of streets, sewers, water systems, parkways and other physical features, but may also include police and fire protection. It is not uncommon for suburban developments to employ "watchmen" who are deputized by the local authorities and to provide them with all the equipment necessary to provide police services.

A town, or other governmental body, cannot prohibit the sale of real property upon discriminatory grounds by ordinance. Although respondents do not constitute a government body they are, through their powers and functions, a gov-

ernment instrumentality. The words of **Shelley v. Kraemer**, 334 U.S. 1, 12, 92 L.Ed. 1161, 68 S.Ct. 836, are apropos here:

"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, Section 1978 of the Revised Statutes, 8 USCA Section 42, 2 FCA title 8, Section 42, derived from Section 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of **Buchanan v. Warley (US) supra**, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: 'The Fourteenth

Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.' "

In **Marsh v. Alabama**, 326 U.S. 501, 505, 90 L.Ed. 265, 66 S.Ct. 276, this court stated:

"... it is clear that had the people of Chickasaw owned all the homes and all the stores and all the streets and all the sidewalks and those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press, religion simply because of single company has legal title to all the town?"

The court further noted, *supra*, l.c. 506:

"Ownership does not always mean absolute dominion more an owner for his advantage opens up his property for the use of the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

Although the town of Chickasaw was a company town owned by the Gulf Ship Building Corporation, the court considered its operation "essentially a public function", *supra*, l.c. 506. Like Chickasaw in **Marsh** the series of Paddock developments in St. Louis County are suburbs of the larger city and they operate as an "essentially a public function", not "differently from any other town". Respondents' suburban developments have all the characteristics of any other town. Therefore, they are responsible under the Fourteenth Amendment, not to discriminate as to the rights to acquire, enjoy, own and dispose of property. Respondents have the

same constitutional obligations as any other governmental body or agency.

The Fourteenth Amendment prohibits a state from making and enforcing any law which denies to any person within its jurisdiction the equal protection of the laws. The United States Supreme Court has always considered the purpose of the Fourteenth Amendment to prohibit the more sophisticated methods of denying a person his constitutionally guaranteed rights and privileges.

In *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, the Court reversed a Court of Appeals decision holding that there was no constitutional or congressional bar to the admitted discriminatory exclusion of Negroes because Jaybird's primaries were not to any extent state controlled.

Both the Jaybird Democratic Association, and the suburban developer, though not an official agency of the state, in effect, perform governmental functions. The Jaybird Association which held a primary election before the Democratic primary, held precisely the kind of election that the Fifteenth Amendment was enacted to prevent. The suburban developer, who performs governmental functions, excluded a citizen from a community because of his race. Like the Jaybird primaries the suburban developers' activities have a substantial impact on public interest. Here, as in *Terry v. Adams*, *supra*, we must look at the substantial impact of this discrimination on public interest and not be deceived by the form of that discrimination.

"... It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election. . . . It is immaterial that the state does not control that part of this elective process which

it leaves for Jaybirds to manage. . . ." Terry v. Adams,  
345 U.S. at 469.

It, also, violates the Fourteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of an ordinance excluding Negroes from suburban developments. Here, too, it is immaterial that the state does not control the policy of the suburban developer, but leaves it for a private corporation to manage.

**CONCLUSION.**

Therefore, upon the foregoing arguments and authorities the Missouri Commission on Human Rights respectfully submits that the order below sustaining respondents' motion to dismiss should be reversed and the cause remanded for trial.

Respectfully submitted,

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